UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	DNS –FAS Docket No. 08-0139
	)	
Trevor James Flugge,	)	
	)	
Petitioner	)	**DECISION AND ORDER**

This is an appeal under 7 C.F.R. § 3017.890 to vacate a Debarment Decision issued on May 2, 2008, by the Administrator of the Foreign Agricultural Service (FAS). Under the Debarment Decision, Petitioner, Trevor James Flugge, would be ineligible for five years from participation in nonprocurement transactions and contracts subject to the Federal Acquisition Regulation (48 C.F.R. chapter 1), throughout the executive branch of the Federal Government.

As the assigned appeals officer, my authority is specified by 7 C.F.R. § 3017.890:

> (a) ….The assigned appeals officer may vacate the decision of the debarring official only if the officer determines that the decision is:
>
> (1) Not in accordance with law;
> (2) Not based on the applicable standard of evidence; or
> (3) Arbitrary and capricious and an abuse of discretion.
>
> (b) The appeals officer will base the decision solely on the administrative record.

Upon my review of the Administrative Record (AR), I have concluded that the decision debarring Mr. Flugge for five years should be vacated under the "arbitrary and capricious" standard.

The Issues

The Administrator of FAS based the debarment of Mr. Flugge on his actions as an officer of the Australian corporation, AWB Limited. AWB was debarred for a period of two years in addition to one year of a previous suspension, or three years overall, to complete reforms needed to be "presently responsible" in light of its payment of kickbacks disguised as trucking fees to Saddam Hussein's government in violation of conditions applicable to its sale of wheat to Iraq as a participant in the United Nations' Oil-For-Food Program. *See In re: AWB LTD. and its Affiliated Companies,* DNS-FAS Docket No. 08-0053 (April 21, 2008).

As was the case in AWB's debarment, the Administrator's debarment of Mr. Flugge is based on findings of a Commission established by the Australian government to investigate corruption by Australian companies that participated in the U.N. Program. The Commission was headed by the Honourable Terance RH. Cole AO RFD QC, and was given Royal Commission powers. Based on discussions with officers of AWB and the Saddam Hussein Iraq government, and a meticulous review of contracts, the Commission ascertained that:

> Between 1999 and March 2003 AWB paid in excess of US $224 million in inland transportation fees, including the 10 per cent after-sales-service fee (where that fee was imposed), in respect of 28 contracts concluded under the Oil-for-Food Programme.
>
> (Cole Report at 43 of Vol. 2).

The findings of the Cole Report, support the conclusion stated as a finding by Justice Young, Federal Court of Australia that:

> AWB knew that paying inland transportation fees to Alia (the Iraqi company used as a front) was a means of making payments to the Iraqi Government. This plan was concealed from the United Nations.

(Cole Report at xi).

Mr. Flugge's appeal petition advises that between 1999 and March 2003, when these kickbacks were being paid, he was the Non-Executive Chairman of AWB with a small salary. He argues that the day-to-day management of AWB was the responsibility of another person who held the position of Managing Director and CEO. Mr. Flugge had been appointed to the Non-Executive position by the Australian government in April 1995. AWB started supplying substantial quantities of wheat to Iraq under the U.N. Oil-For-Food Program in 1997. Mr. Flugge left the position in March 2002 when he was provided a contract with AWB as a consultant that ended on April 1, 2003, when he accepted a position with the Australian government to lead its agricultural reconstruction team in Iraq as senior agricultural adviser to the Iraqi Provisional Authority. That position ended in February 2004, and his sole present connection to agriculture is working on the family farm, which is held in trust by others. His appeal petition states that he does not own or transact any agricultural business that has the capacity to contract with USDA.

The appeal petition argues that the Debarment Decision should be vacated for the following reasons:

> (1) The debarment violates due process because Mr. Flugge was not provided adequate notice of the conduct at issue, and the basis for debarment must be more than uncorroborated accusations.
>
> (2) Where a person has never contracted with the USDA and who has no capacity to contract with USDA as he is retired working only on the family farm, and where the conduct at issue occurred over five years prior, and where the debarment is for a period two and half times more than the entity for which he worked, the debarment violates 7 C.F.R. § 3017.800(d) and 7 C.F.R. § 3017.110(c).

Conclusions

1. Mr. Flugge's Right to Due Process was not violated for lack of adequate notice or adequate evidence.

Mr. Flugge received adequate notice that the Administrator was going to rely upon the evidentiary findings of the Cole Report in determining whether Mr. Flugge should be debarred. Mr. Flugge's Australian counsel received response after response to his inquiries that made this clear. (AR 1-56). On March 13, 2007, Mr. Flugge's counsel was advised that a fact-finding hearing was scheduled for April 30, 2007 in the FAS offices in Washington, and was asked whether Mr. Flugge denied specified statements in the Cole Report concerning the payment of kickbacks to the Iraqi regime by AWB and communications among officers of AWB that included Mr. Flugge regarding these payments. (AR 58-60). In response, his counsel again stated that FAS had failed to identify the documentary evidence relied upon and asked that the hearing FAS had scheduled be stayed as premature. (AR 61-62).

Though Mr. Flugge did not appear at the scheduled fact-finding hearing, the Administrator did consider and review submissions Mr. Flugge's counsel had made on his behalf in correspondence of February 27, 2007, that challenged the reliability of the findings of the Cole Commission and the recorded recollections of other AWB officers, and denied that he had knowledge that the trucking fees being paid by AWB were improper or in violation of any laws. (AR 134-136). The Administrator stated that to accept these contentions, he would need to determine that findings of the Cole Report were false and inaccurate.

Mr. Flugge's activities on behalf of AWB were specifically investigated by the Cole Commission which made findings concerning his possible accessorial liability and

whether he may have committed offences under Australia's Corporations Act 2001. *See* Cole Report, Vol. 4, pp.216-225, paragraphs 31.274-31.294. Based on his presence at critical meetings when arrangements for paying the kickbacks were discussed, and statements obtained from other officers of AWB in attendance at the meetings, the Commission found that despite Mr. Flugge's denial of knowledge of the true arrangements:

> …he did know the true arrangements and, as chairman of AWB, approved of them. Those arrangements involved circumventing UN sanctions by paying money to Iraq using Ronly, shipowners and Alia to hide the making of such payments. By authorizing officers of AWB to proceed with the arrangements insisted on by IGB in its phase VI tender and agreed to by AWB, Mr. Flugge implicitly authorized officers of AWB to submit to DFAT and the United Nations contracts which did not disclose the true agreements reached with the IGB. Mr. Flugge approved of this course in order to preserve AWB's trade with Iraq which he knew would otherwise be lost.
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> (Cole Report at 222 of Vol. 4, paragraph 31.292).

Mr. Flugge has argued that the evidence relied upon by the Administrator of FAS was not of an evidentiary level sufficiently reliable for his factual findings. However, as stated in *AWB, supra,* slip opinion page 14*,* hearsay evidence is customarily allowed in administrative proceedings, and the Administrator's evaluation of the evidence set forth in the Cole Report was in accordance with law and based on the applicable standard of evidence. The debarment determination required only "adequate evidence" as defined in 7 C.F.R. §3017.900:

> *Adequate evidence* means information sufficient to support the reasonable belief that a particular act or omission has occurred.

Therefore, Mr. Flugge did receive adequate notice of the evidence that the Administrator of FAS would consider, and there was adequate, legally sufficient

evidence to support the Administrator's determination to debar Petitioner pursuant to 7 C.F.R. § 3017.800(d) and his underlying finding that:

> … there exists a cause of so serious or compelling a nature that it affects your present responsibility to participate in programs of the United States Government.
>
> (AR 134).

2. For the reasons previously stated, the Administrator's Debarment Decision does not violate 7 C.F.R. § 3017.800(d). The Debarment Decision also is not found to violate 7 C.F.R. § 3017.110(c). However, because it lacks satisfactory explanations for actions chosen, the Debarment Decision must be vacated as arbitrary and capricious.

The Administrator stated he believed from the evidence set forth in the Cole Report that Mr. Flugge "either directly, or implicitly, authorized AWB officials to enter into contracts in a manner that resulted in illicit payments to the Iraqi government, and that…(Mr. Flugge) engaged in conduct to conceal such transactions from officials of the United Nations and the Australian Government." (AR 137). Based on this finding he concluded that Mr. Flugge "did not presently possess the requisite responsibility for purposes of participating in programs of the United States…. Further, there is nothing submitted by you to support, in any manner, that you now currently possess the capacity to insure that such egregious conduct could not be engaged by you or an entity with which you may be associated." (AR 137).

Mr. Flugge contends that his debarment is for the purpose of punishment that is forbidden by 7 C.F.R. § 3017.110 (c). He primarily bases this argument on the conduct at issue having occurred over five years prior to the Debarment Decision and the fact that he is no longer employed by AWB. These arguments are similar to those recently rejected by the United States District Court for the District of Columbia in *Uzelmeier v. U.S.*

Dept. of Health and Human Services, 541 F.Supp.2d 241, 247-248 (D.D.C., March 31, 2008). The Court in that case held that a debarment action is not punitive because a long time period has passed between the underlying events and the decision to debar, or because the individual is not currently involved in a program that receives federal funding. As to the latter, when a governing regulation, such as 7 C.F.R. § 3017.105 (a) includes within its debarment provisions a "person who has been, is, or may reasonably be expected to be, a participant or principal in a covered transaction", present employment is not the controlling criterion for debarment:

> While debarment requires the existence of 'past misconduct,' the phrase 'present responsibility' does not refer to plaintiff's current job, but rather to whether a person's exclusion is in the public interest.
>
> *Uzelmeier, supra. See also Burke v. United States Environmental Protection*

Agency, 127 F.Supp.2d 235, 239 (D.D.C.2001).

The Debarment Determination, however, must be vacated under the "arbitrary and capricious" standard for its failure to explain why Petitioner should be debarred for five years in addition to the suspension that had been in effect since December 20, 2006; which when combined amounts to almost six and a half years. This is more than double the combined three year debarment/suspension previously imposed on AWB. The regulations specify that a debarment should generally not exceed three years (7 C.F.R. § 3017.865(a)), and that a debarring official must consider the time that a person being debarred was previously suspended (7 C.F.R. § 3017.865(b)). The Debarment Decision lacks any language demonstrating that the Administrator took either provision into consideration or explaining why he believed a five year debarment was indicated.

This is not the first instance of a debarment by a USDA debarring official being vacated for such reasons. In *Indeco Housing Corp*., 56 Agric.Dec. 738, 744 (1997), a determination that imposed a five year debarment without explanation was similarly vacated as arbitrary and capricious. The appropriate application of the arbitrary and capricious review standard has been explained in *Sloan v. Dept. of Housing & Urban Development*, 231 F.3d 10, 15 (C.A.D.C., 2000):

> It is well-established that, when conducting review under the "arbitrary and capricious" standard, a court may not substitute its judgment for that of agency officials; rather, our inquiry is focused on whether 'the agency…examine(d) the relevant data and articulate(d) a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.,* 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (*quoting Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962)).

Sloan went on to reverse a decision by HUD that suspended a government contractor because HUD had failed to articulate a satisfactory explanation for its action that included a rational explanation between the facts found and the choice made.

The Debarment Decision in the present proceeding is being vacated because it (1) did not consider the time Mr. Flugge was previously suspended as 7 C.F.R. § 3017.865(b) requires, (2) did not explain why Mr. Flugge should be debarred for five years when debarments generally should not exceed three years as 7 C.F.R. § 3017.865(a) provides, and (3) did not explain why Mr. Flugge should be debarred for a longer period than his corporate employer.

ORDER

The Notice of Debarment, issued on May 2, 2008, by the Administrator of the Foreign Agricultural Service that would debar Petitioner, Trevor Flugge, for five years is hereby vacated.

Dated_____

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Victor W. Palmer
Administrative Law Judge